Supreme Court, U.S.
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No.

In the Supreme Court of the United States
October Term, 2003

DESMOND WARD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THE FOURTH CIRCUIT'S DENIAL OF A CERTIFICATE OF APPEALABILITY IS IN CONFLICT WITH *MILLER-EL v. COCKRELL*, 537 U.S. 322, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003).

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OPINION BELOW

The unpublished opinion of the United States Court of Appeals for the Fourth Circuit is *United States v. Ward*, 90 Fed.Appx. 35, 2004 WL 542256 (4th Cir.March 18, 2004). A copy of the opinion appears in the appendix at App. 20-30.

JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit was filed on March 18, 2004. (App. 29-30). A timely filed application for extension of time for filing this petition for writ of certiorari was granted to July 16, 2004. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

After a trial by jury, the petitioner was convicted of conspiracy to possess with intent to distribute crack cocaine and using a communication facility to facilitate the distribution of drugs. The petitioner was sentenced to 235 months imprisonment. (App. 1).

The convictions arose from two packages containing cocaine that were shipped through Federal Express. The petitioner never disputed that he gave the first package to a courier. But the petitioner maintained that he did not know the contents of that package. As for the second package, the petitioner claimed he had nothing to do with it and that Jackie May, the Federal Express clerk who identified his photograph and claimed he drove a pickup truck, was wrong. (App. 1-7). The district judge who presided over the trial characterized the case against the petitioner as perhaps "the weakest case of its sort that I have seen ...". (App. 7).

The petitioner appealed to the United States Court of Appeals which affirmed the petitioner's sentence and conviction. *United States v. Ward*, 176 F.3d 476 (4th Cir.1999).

Pursuant to 28 U.S.C. § 2255, the petitioner moved to vacate his convictions and sentence alleging that he had

received ineffective assistance of counsel. (App. 1-13). The petitioner's allegations in the motion were under oath. *Id.* In pertinent part, the petitioner alleged that his counsel: (1) failed to move to suppress the suggestive photographic identification shown to May; (2) failed to present evidence to the jury that a pickup truck identified by a government witness as having been parked behind the petitioner's residence did not belong to him and was in fact inoperable and therefore could not have been the pickup truck referred to by May in her testimony; (3) failed to investigate and present alibi evidence showing that the petitioner was at his place of business during the time May testified she observed him, including the time card submitted with the petitioner's motion to vacate; and (4) failed to honor the petitioner's desire to testify at the trial.

The district judge denied the motion to vacate without an evidentiary hearing. (App. 14-20). The district judge ruled as follows with regard to each of the above-numbered allegations of ineffective assistance of counsel: (1) even if the photographic identification were suggestive, defense counsel's failure to move to suppress would have been denied because May's trial testimony identifying the petitioner was reliable; (2) May's testimony that the petitioner drove a pickup truck was elicited by defense counsel, not the prosecution; (3) the petitioner and his counsel "must have discussed this alleged alibi defense" because the petitioner's manager and supervisor were listed as witnesses and the timecard was listed as an exhibit; the petitioner did not provide witness affidavits; and the timecard was not persuasive. *Id.*

The petitioner sought to appeal and submitted to the Fourth Circuit an "informal brief" (App. 21-28) which that court treats as a request for a certificate of appealability pursuant to 28 U.S.C. § 2253(c)(1)(2000). The petitioner raised as error the district judge's failure to conduct an evidentiary hearing upon the petitioner's claims of ineffective assistance of counsel. More specifically, the petitioner argued that his claims of ineffective assistance of counsel raised factual issues that could not be resolved without an evidentiary hearing and that the district judge improperly resolved factual disputes and reached factual

determinations. *Id.*

On March 18, 2004, the Fourth Circuit denied a certificate of appealability and dismissed the petitioner's appeal. The entire opinion of the Fourth Circuit is as follows:

> Desmond Ward seeks to appeal the district court's order denying relief on his motion filed under 28 U.S.C. § 2255 (2000). The order is not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1) (2000). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2000). A prisoner satisfies this standard by demonstrating that reasonable jurists would find that his constitutional claims are debatable and that any dispositive procedural rulings by the district court are also debatable or wrong. *See Miller-El v. Cockrell,* 537 U.S. 322, 336-38, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003) [hereafter *Miller-El*]; *Slack v. McDaniel,* 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000); *Rose v. Lee,* 252 F.3d 676, 683 (4th Cir.2001). We have independently reviewed the record and conclude that Ward has not made the requisite showing. Accordingly, we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

(App. 29-30).

REASONS FOR GRANTING THE WRIT

The Fourth Circuit is not following the standard for issuing a certificate of appealability promulgated by this Court in *Miller-El.* The Fourth Circuit refused to issue a certificate of appealability even though the petitioner's appeal clearly met the *Miller-El* standard by showing that reasonable jurists could debate whether the petitioner's

motion to vacate should have been resolved in a different manner, *i.e.*, with an evidentiary hearing as required by 28 U.S.C. § 2255 (which provides that the district judge shall grant a prompt evidentiary hearing "unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief...").

ARGUMENT

In order to appeal a district court's order denying a motion to vacate conviction and sentence pursuant to 28 U.S.C. § 2255, a federal prisoner must first seek and obtain a certificate of appealability [COA] from a circuit justice or judge. 28 U.S.C. § 2253(c)(1)(2000). Pursuant to § 2253(c), a COA will not issue unless the petitioner has made a "substantial showing of the denial of a constitutional right."

In *Miller-El*, this Court explained the standard for issuance of a COA as follows:

> In *Slack, supra*, at 483, 120 S.Ct. 1595, we recognized that Congress codified our standard, announced in *Barefoot v. Estelle*, 463 U.S. 880, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983), for determining what constitutes the requisite showing. Under the controlling standard, a petitioner must "sho [w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.' " 529 U.S., at 484, 120 S.Ct. 1595 (quoting *Barefoot, supra*, at 893, n. 4, 103 S.Ct. 3383).

Miller-El, supra at 336, 123 S.Ct. at 1039. This Court further explained in *Miller-El* the following:

> [A] COA does not require a showing that the appeal will succeed. Accordingly, a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief. The holding in *Slack* would mean very little if appellate review were denied because the prisoner did not convince a judge, or, for that matter,

> three judges, that he or she would prevail. It is consistent with § 2253 that a COA will issue in some instances where there is no certainty of ultimate relief. After all, when a COA is sought, the whole premise is that the prisoner " 'has already failed in that endeavor.' " *Barefoot, supra,* at 893, n. 4, 103 S.Ct. 3383.

Id. at 337, 123 S.Ct. at 1039.

Following his convictions in federal district court on drug charges, the petitioner filed a § 2255 petition alleging ineffective assistance of counsel. The district judge denied the petition without first conducting an evidentiary hearing. The petitioner sought a COA from the Fourth Circuit in order to raise the claim that the district judge improperly failed to conduct an evidentiary hearing. In a "form" order that does not address any specifics of the petitioner's claim, the Fourth Circuit denied a COA and dismissed the petitioner's appeal. After citing the standard of *Miller-El*, *Slack*, and its own decision in *Rose v. Lee, supra*, the Fourth Circuit reached the following conclusion: "We have independently reviewed the record and conclude that [the petitioner] has not made the requisite showing." (App. 30).

In *Miller-El*, the petitioner sought a COA in order to raise a claim that his jury selection procedures violated the Equal Protection Clause and this Court's decision in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). The Fifth Circuit denied a COA. This Court reversed. In commencing the analysis, this Court stated: "Since Miller-El's claim rests on a *Batson* violation, resolution of his COA application requires a preliminary, though not definitive, consideration of the three-step framework mandated by *Batson*, and reaffirmed in our later predents." *Miller-El, supra* at 338, 123 S.Ct. at 1040.

Here, since the petitioner's claim rests upon a violation of his Sixth Amendment right to effective assistance of trial counsel, the resolution of his COA application requires a preliminary, though not definitive, consideration of the standard for granting or denying an evidentiary hearing under § 2255 alongside the framework established in *Strickland v. Washington*, 466 U.S. 668, 104

S.Ct. 2052, 80 L.Ed.2d 674 (1984) for assessing an ineffectiveness claim. Under § 2255, the district judge must conduct an evidentiary hearing "[u]nless the motion and the file and the records of the case conclusively show that the prisoner is entitled to no relief ...". Under *Strickland*, a claim of ineffective assistance requires a showing that counsel's performance was both objectively unreasonable and prejudicial to the defendant.

The petitioner presented several instances of alleged ineffective assistance of trial counsel. The petitioner claimed his trial counsel failed to present alibi evidence. At the petitioner's trial, government witness May, a Federal Express employee, testified that a package found to contain cocaine was given to her for shipment by the petitioner. In his sworn § 2255 motion, the petitioner alleged that his trial counsel failed to present alibi evidence that the petitioner was at work at the time the package was received by May. Along with his sworn motion, the petitioner submitted his time card from work. In summarily rejecting the claim, the district judge noted that the petitioner's trial counsel had listed the petitioner's manager and supervisor as alibi witnesses and listed the timecard as a potential exhibit. The district judge concluded therefrom "that Petitioner and his counsel must have discussed this alleged alibi defense." (App. 19). But the district judge's conclusion fails to address the unresolved fact-based question, namely, why wasn't the alibi defense presented? The district judge further faulted the petitioner for not providing affidavits of the manager and supervisor. But the petition itself was under oath. The district judge also ruled that the timecard was "not very persuasive." But again, that is a factual determination made without the benefit of an evidentiary hearing.

The problem is that the district judge resolved factual issues about the alibi defense without an evidentiary hearing in direct violation of § 2255 because the files and record failed to "conclusively" refute the petitioner's allegations. Consequently, reasonable jurists could debate, at the very least, whether the district judge should have resolved the matter differently, and the Fourth Circuit should have issued a COA.

Similar problems arise with the district judge's denials of the balance of the petitioner's ineffectiveness claims. Trial counsel failed to move to suppress May's identification which was based upon an allegedly suggestive photographic identification. The district judge summarily rejected this claim as well on the ground that May's trial testimony shows that the identification was reliable. However, the issue of the suggestiveness of the identification was not litigated at the trial. Thus, a COA should have issued on this claim as well because reasonable jurists would debate the propriety of the district judge's denial without an evidentiary hearing.

May testified that the petitioner drove a pickup truck and at trial, the government relied upon evidence that investigators learned that a pickup truck was parked at the petitioner's residence. The petitioner alleged that his trial counsel ineffectively failed to conduct a basic investigation that would have established that the pickup truck at the residence did not belong to the petitioner and was inoperable. The district judge summarily rejected this claim on the ground that May's testimony about the truck was adduced by petitioner's trial counsel rather than by the government. Of course, it matters not how the jury learned of the evidence. But it did matter that petitioner's trial counsel failed to refute the suggestion that May's credibility was bolstered by the existence of a pickup truck at the petitioner's residence. Again, the Fourth Circuit should not have denied a COA on the issue whether the district judge's summary resolution of this issue constituted reversible error.

The district judge also summarily rejected the petitioner's claim of ineffective assistance of trial counsel based upon counsel's failure to honor his desire to testify. As the district judge recognized, the petitioner alleged that "he wanted to testify that he did not know the contents of the first box. He also wanted to testify that he had nothing to do with the second Federal Express box." The district judge rejected the claim, again without an evidentiary hearing, because the petitioner's claim lacked "specifics" and "clearly petitioner knew of his right to testify." Again, because such a fact-based claim cannot be dismissed without an evidentiary hearing, the Fourth Circuit should have issued a COA.

Thus, for the foregoing reasons, the decision of the court of appeals conflicts with the decision of this Court in *Miller-El.*

CONCLUSION

For the foregoing reasons, the petitioner respectfully requests that the Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit be granted

Respectfully submitted,

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DATED: June 2004.

APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
3:96CR29-MU

DESMOND WARD,

Movant/Defendant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

MOTION PURSUANT TO 28 U.S.C. § 2255 TO VACATE JUDGMENT AND SENTENCE

The defendant, Desmond Ward, through undersigned counsel, respectfully requests that this Court grant him an evidentiary hearing upon his claim of ineffective assistance of trial counsel and states:

A. STATEMENT OF THE CASE

The defendant was charged in a three-count superseding indictment with conspiracy to possess cocaine with intent to distribute (count one), possession with intent to distribute cocaine (count two), and knowingly using a communication facility to facilitate the offense of possession with intent to distribute cocaine. (App. 10-11) ("App." designates the pages of the Appendix which accompanies this motion). At the close of the government's case, this Court entered a judgment of acquittal as to count two. (App. 338-39). The jury found the defendant guilty of counts one and three. (App. 454). On April 29, 1998, the defendant was sentenced to a term of imprisonment of 235 months. (App. 530-531). The defendant, who has had no prior brushes with the law, was at liberty throughout the proceedings including his appeal. (App. 532). The Fourth Circuit affirmed the convictions in an unpublished opinion reported at 176 F.3d 476. The defendant voluntarily surrendered to the custody of the Bureau of Prisons where he remains incarcerated. The mandate of the Fourth Circuit issued June 16, 1999.

B. STATEMENT OF THE FACTS

On January 26, 1995, Federal Express subcontracted a courier service to pick up a box from a residence in Miami, Florida. The tracking document (Government Exhibit 7, App. 469) indicated the box contained bathroom supplies and that the shipper was David King, 767 N.W. 47th Terrace, Miami, Florida, 305-754-0556. It was later learned that the address and telephone number belonged to the defendant's grandmother, Philistine Ward, and that the defendant resided at that address. It was not known who telephoned Federal Express and gave the information for the pickup. The tracking document listed the recipient as Terry Crawford, 113 Walnut Avenue, Charlotte, NC, telephone number 704-364-2400 [room] 567. (App. 129; 256-57; 262-64; 266; 469).

When the courier (Jason Cardini) appeared, the defendant went to his car (the white sedan pictured in Government's Exhibit 4, App. 463) and retrieved the box. (App. 258). The courier did not ask if the defendant packaged the box or if it ever left his sight. (App. 265). The courier testified that he routinely picks up packages from people who do not prepare the contents for shipping. (App. 265).

The courier handed the defendant two forms, a Federal Express Airbill (Government's Exhibit 1, App. 460) and a "Network Courier Services Shipper's Security Notification". (Government's Exhibit 3, App. 462; App. 257-59). The defendant went into the house to fill out the forms. The defendant spent approximately ten minutes inside. He returned with the forms executed as follows. The sender was listed as David King of 770 N.W. 47th Terrace, Miami, Florida. The recipient was listed as Terry Crawford of the identical address and telephone number which appeared on the tracking document. (App. 460). It was later learned that the telephone number listed for Crawford on the tracking document and airbill belonged to the SouthPark Suite Hotel in Charlotte. (App. 77-8; 185; 259; 271; 460).

On the Shipper's Security Notification, the defendant signed his own name on the top line which called for the "Company or Shipper's Name". A second signature line called for the "Shipper's Signature" beneath a paragraph stating that the shipment did not contain explosive devices. The defendant signed his own name on that line. The center of the form called for two forms of identification and provided two lines, one for a driver's license number and the other for a second source of

identification. The defendant provided his correct driver's license number and left the second line blank. A third signature line, also calling for the "Shipper's Signature", was beneath the following sentence: "If two forms of proper identification are not produced, sign below to indicate the contents have been visually inspected and verified to match the shipping documents." On this line, the defendant signed his own name as well. (App. 462). The defendant returned the forms to the courier and paid with two traveler's express money orders which indicated that the purchaser was David King. (Government Exhibit 2, App. 461; App. 77; 258-60).

The box was opened by the courier service and taken to police who discovered that it contained crack cocaine and bathroom items. (App. 81; 104; 260-61). The cocaine was packaged within two or three rubber bins and wrapped in brown paper bags. (App. 86-7). The cocaine had the appearance of unbaked cookie dough. (App. 276). No latent fingerprints were obtained from any of the items. (App. 82).

The authorities were notified that a second box destined for 113 Walnut Avenue on the same day was in a Federal Express office in North Carolina. The airbill indicated that the box was shipped from Dale Riche. The address and telephone number for Riche proved to be false. The recipient was listed as Elliot Johnson at the Walnut Avenue address. (App. 78, 98-101, 109, 113). The box originated from a Federal Express office in North Miami. (App. 70). A search warrant for the box was obtained and executed. (App. 101).

The box was opened and cocaine was discovered inside. The packaging of the cocaine and the other contents were different from the first box. The cocaine in this second box was packaged in 420 small blue bags which were within 6 larger bags and 11 Winston soft pack cigarette packages. The box also contained a newspaper, screwdriver set, and Tupperware. Some of the contents were processed for fingerprints but no identifications could be made. (App. 104-6; 115; 117-18; 121-22; Government's Exhibit 22-d, App. 494).

Law enforcement authorities made up a box similar to the one seized in Miami and placed a tracking device inside. Crawford's residence was placed under surveillance while the authorities made a controlled delivery of the box. (App. 100; 112; 187). Crawford signed for the box and took it inside the residence. Crawford exited the residence and motioned to an individual. Crawford handed the box to the individual who

walked away from the house. The surveillance agents stopped Crawford on the sidewalk and arrested him. (App. 101; 188-89; 198-200). The police were unable to locate the individual who took the box from Crawford and the box was never located. (App. 101; 188-89; 192-200).

On January 29, 1996, police appeared at the residence of the defendant's grandmother. Photographs were taken of the defendant and his car. (Government Exhibit 4, App. 463; Government Exhibit 12, App. 476; App. 64-5; 77; 87). Several days later, the police showed the courier a photographic display of six individuals. (App. 261). The courier selected the photograph taken of the defendant at his residence, which was photograph number five. The courier explained that photograph five "very well stood out" and "was not like any of the other pictures" because it was so dark. (App. 87; 261-62; 269-70). (One of the police officers testified that the defendant's picture was the only one that was almost midnight black. (App. 90)). The photograph was taken while the defendant was standing under a tree and a dark shadow was across his face. (App. 80). The defendant's trial counsel failed to move to suppress the identification as suggestive. This Court *sua sponte*, refused to allow the courier (or any other government witness) to attempt an in-court identification of the defendant. (App. 248).FN1

> FN1 This Court ruled that the government's witnesses would not be allowed to bolster the "inherently weak photo lineup which I think is barely usable" with any in-court identifications, adding that the ruling might not be necessary had the photographic lineup been fairer or if there had been a live lineup. (App. 248). See, generally, *United States v. Murray*, 65 F.3d 1161, 1168-69 (4th Cir.1995) (discussing law governing suggestive identifications).

Jackie May, an employee at the North Miami Federal Express office, was shown a photographic lineup containing the same dark photograph of the defendant previously shown to the courier. The employee selected photograph number five as the person who had brought the box to the Federal Express office. The employee stated that the person arrived in a pickup truckFN2 and attempted to pay with cash. She told the person

> FN2 An officer testified that he observed a pickup truck

behind the house where the defendant resided but did not determine whether it was operable or had a valid tag. Nor did the officer attempt to have Jackie May identify the truck. (App. 324-29).

that cash was not accepted and he went to the 7-11 convenience store down the street and returned with money orders. When he decided to upgrade the service, he went back to the store for yet another money order. (App. 70-72; 76; 303; 306; 309; 317-18).

FN3 Jackie May turned over to law enforcement the paperwork in reference to the money orders. (App. 310). The record is devoid of that paperwork.

The person filled out the airbill in the presence of the employee. (App. 313; Government Exhibit 22-a, App. 492).

Crawford testified as a government witness. He stated that he was a crack cocaine user who purchased his cocaine from Roscoe McCaskill. McCaskill introduced Crawford to one "Keith". Crawford did not know whether "Keith" was Christopher Simmons and was never shown a photograph of Simmons.FN4. Crawford knew that Keith's girlfriend was the

FN4 Another government witness did testify that she referred to Simmons as "Keith" (which apparently is his middle name). (App. 285).

sister of Roscoe's girlfriend who is known as "Nut." Crawford testified that Keith and McCaskill promised him $500 to receive a Federal Express box on January 26 which McCaskill stated would be in the name of Elliot Johnson. Crawford had never before been offered money to receive a package. Crawford was not told that there would be drugs in the box and did not know who sent the box. The box came a day late. When the box arrived at Crawford's residence, Keith, McCaskill, and a third unknown individual were waiting in a car nearby. Crawford motioned and the unknown individual came over. Crawford handed him the box and he returned to the car. (App. 213-18, 222-24; 228; 230-33). After Crawford was arrested and released on bond, he had a conversation with McCaskill who told him that when they opened the box, the tracking device was discovered and discarded. (App. 221). Crawford testified that he did not know the defendant. (App. 225). The

prosecution conceded that there was no proof that Crawford knew the defendant. (App. 203).

A handwriting analysis expert submitted a report (Government Exhibit 25, App. 516) and testified for the government. The expert concluded that the following were written by the defendant: the Federal Express Airbill from David King to Crawford (Government Exhibit 1, App. 460); the money orders for the David King box (Government Exhibit 2, App. 461); and the Network Courier Services Shipper's Security Notification on which Ward signed his own name. (Government's Exhibit 3, App. 462). (App. 145, 152). As for the handwriting on the Federal Express Airbill for the box sent from Dale Riche to Elliot Johnson, the expert's analysis was inconclusive, *i.e.*, he could neither include nor exclude the defendant. (App. 140).

The government also presented telephone and hotel records and related testimony (App. 129-131, 180-86, 192, 253-55; Government Exhibits 18, 19, 20, 29, 31) which the government argued (App. 335-36) established the following: on January 22, a local call was made from room 567 in the SouthPark Suite Hotel in Charlotte registered to Christopher Simmons of North Miami Beach, Florida, to a cellular telephone associated with Roscoe McCaskill; on January 26, 1996, a telephone call was placed from the number subscribed to the defendant's grandmother to the cellular telephone number associated with McCaskill; and telephone calls were placed between that cellular telephone number and McCaskill's house. The Government also showed that when he was arrested, the defendant had $4,155.60 in cash on his person. (App. 169).

The Miami probation officer for Simmons testified that Simmons was authorized to travel to North Carolina October 26-31, 1995, December 28-30, 1995, and January 21-24, 1996. (App. 239).

At the close of the government's case, this Court entered a judgment of acquittal as to count two. (App. 338-39). After consideration, this Court denied the motions for judgments of acquittal as to counts one and three. (App. 339).

Defense counsel presented only one witness, the defendant's grandmother, Philistine Ward. Mrs. Ward testified that she raised the defendant from birth and he resided with her and nine children at her residence. (App. 352-53). With regard to the $4,155.60 in the defendant's possession when he was arrested, Mrs. Ward explained that the cash was from her. She had

withdrawn $10,000 from her annuity on December 5, 1996, deposited it in her savings account and withdrew cash for remodeling the house. On March 8, 1996, she gave $4,000 cash to the defendant for purchasing items including bathroom fixtures and flooring. (App. 353-59). Mrs. Ward documented the annuity, the $10,000 withdrawal, and purchases for the remodeling. (Defendant's Exhibits 1-5; T. 354-65).FN*

FN* The record of the $4,000 withdrawal she had left at home but offered to produce it. (App. 371).

Mrs. Ward explained that there was a pickup truck on her property which belonged to her nephew, Charles Wilford. The truck had been parked since 1994, does not run, and has flat tires and junk in its bed. (App. 369).

The jury found the defendant guilty of conspiracy to possess with intent to distribute cocaine and using Federal Express to facilitate the offense of possession with intent to distribute cocaine. (App. 454).

C. THE APPLICABLE PRINCIPLES OF LAW

As this Court repeatedly opined during the defendant's trial, the case for the prosecution was extremely thin.FN*

FN* For example, at the close of the Government's case, this Court remarked: "If this isn't the weakest case of its sort that I have seen, it's pretty close...". (App. 338). Similarly, in response to the motion of defense counsel for a judgment of acquittal at the close of the Government's case, this Court stated: "With considerable reluctance, I'm going to overrule your Rule 29 motion on Counts 1 and 3. I may well be committing error." (App. 339).

Under such circumstances, the zealous representation to which every accused is entitled under the Sixth Amendment to the Constitution of the United States, see *Strickland v. Washington*, 466 U.S. 668 (1984), takes on added significance because any error by counsel can result in a miscarriage of justice.

A defendant is denied his constitutional right to effective assistance of counsel where counsel has failed to investigate or present avenues of defense or otherwise failed to afford competent representation of the kind which undermines confidence in the outcome of the case. *Strickland, supra.*

The Sixth Amendment guarantee of effective assistance imposes upon counsel "a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland v. Washington*, 466 U.S., at 692, 104 S.Ct., at 2066. "[W]hen a lawyer fails to conduct a substantial investigation into any of his client's plausible lines of defense, the lawyer has failed to render effective assistance of counsel." *House v. Balkcom*, 725 F.2d 608, 617-19 (11th Cir.), *cert. denied*, *Balkcom v. House*, 469 U.S. 870, 105 S.Ct. 218, 83 L.Ed.2d 148 (1984).

Failure to conduct a sufficient investigation into a defense is not a tactical decision. Tactical decisions are made in the context of reasonable investigation. "It is not enough to assume that counsel ... thought there was no defense, and exercised [his] best judgment.... Neither [he] nor the court could say what a prompt and thoroughgoing investigation might disclose as to the facts." *Powell v. Alabama*, 287 U.S. 45, 58, 53 S.Ct. 55, 60, 77 L.Ed. 159 (1932).

When counsel fails to investigate an alibi defense, such a failure is deemed constitutionally deficient. See *Griffin v. Warden*, 970 F.2d 1355 (4th Cir.1992) (citing cases). See also *Brown v. Myers*, 137 F.3d 1154, 1156-57 (9th Cir.1998); *Hadley v. Groose*, 97 F.3d 1131, 1134-35 (8th Cir.1996); *United States v. Gray*, 878 F.2d 702, 711 (3d Cir.1989); *Montgomery v. Petersen*, 846 F.2d 407, 414 (7th Cir.1988); *Code v. Montgomery*, 799 F.2d 1481, 1483 (11th Cir.1986); *Nealy v. Cabana*, 764 F.2d 1173, 1178-80 (5th Cir.1985); *Gomez v. Beto*, 462 F.2d 596 (5th Cir.1972). These decisions have turned upon the common sense notion that "independent corroboration by a neutral, disinterested witness would perforce be extremely significant." *Montgomery*, 846 F.2d at 414; see also *Hadley*, 97 F.3d at 1135 (given crucial nature of alibi witness, failure to investigate was deficient performance) *Workman v. Tate*, 957 F.2d 1339, 1345 (6th Cir.1992) (failure to investigate and interview promising witnesses is negligence rather than trial strategy).

In this case, the defendant is entitled to a new trial, or at least an evidentiary hearing, based upon defense counsel's several failures, including but not limited to the following: failure to move to suppress a suggestive identification procedure; failure to investigate or present evidence concerning the pickup truck observed at the residence of the defendant's grandmother; failure to timely object to improper closing

argument; failure to investigate or present alibi evidence; failure to advise the defendant of the nature and existence of the right to testify.

Each of defense counsel's failures is addressed below and affords a ground for an evidentiary hearing whether viewed individually or cumulatively.

1.

THE UNCHALLENGED SUGGESTIVE PHOTOGRAPHIC LINEUP IDENTIFICATIONS

As noted, the charges against the defendant arose from the discovery of cocaine in two boxes shipped from separate places at separate times via Federal Express from Florida to one Terry Crawford in Charlotte, North Carolina, a person unknown to Ward. The first package was picked up by a courier on January 26, 1996 from a residence in Miami, Florida owned by Ward's grandmother and where Ward resides with his 3-year old daughter. The second package was brought the following day to a Federal Express office in North Miami Beach, Florida. Following the discovery of the cocaine, law enforcement officers took a photograph of Ward which was placed with others in a photographic lineup, Government's Exhibit 6. The photographs were shown to Jason Cardini, the courier who had picked up the first box, and to a Federal Express clerk who had received and processed the second box.

The photograph of Ward stood out from the others to such a degree that the courier testified during the Government's case in chief as follows:

> Q [by the prosecutor]. I have what is marked as Government Exhibit 6, do you recognize this document?
> A [by Cardini]. Yes.
> Q. And do you recognize the inside of this document?
> A. Yes.
> Q. Okay. Now is this, Government Exhibit 6, is this the item that the police officer showed to you a couple days after this package?
> Q. Yes.
> A. Now, did he ask you to identify any one of these six photographs?
> A. Yes.
> Q. And did you identify someone?
> A. Yeah.
> Q. Who did you identify?

A. This person here.
Q. Number five?
A. Yeah.
Q. And did you -- is that --
A. *The picture [of Ward] very well stood out as well, too.*
THE COURT: Excuse me, sir. You said the picture stood out as well?
THE WITNESS: Yeah, it did.
THE COURT: Because of the appearance of the picture, the photograph, the coloration of it, the darkness of it?
THE WITNESS: Yes, it was not like any of the other pictures.
(App. 261-62).

Cardini added that he had not paid any attention to the person who gave him the package ("I never paid any attention. When I got this, that was it. I didn't even look at him."). (App. 267).FN*

> FN*The clerk who received the second package selected Ward's photograph as the person who brought her the package. That clerk denied on direct examination by the prosecutor that the photograph of Ward was any different from the others. (App. 302, 305). However, later in her testimony, the clerk reluctantly conceded that Ward's photograph did stand out. (App. 316). That clerk also claimed that Ward drove up in a pickup truck. (App. 317). But as explained below, Ward does not own or drive a pickup truck and an agent gave misleading testimony on that issue.

Even prior to Cardini's testimony, this Court felt that the identification procedures were so untrustworthy that it prohibited any in-court identifications by either of the clerks.

> FN* Specifically, this Court indicated that in-court identifications, which are inherently suspect, would be particularly untrustworthy in this case because Ward is black and his counsel were black whereas the prosecution team consisted of three white people. This Court stated: "We've got three white folks sitting over here, we've got three black men sitting here, two of whom are participating in the trial. These jurors are not stupid people, who else would [the clerks] identify?"

(App. 248). When this Court was asked by the prosecutor whether he could refer to the clerks as "eyewitnesses", this Court responded as follows: "Sure ... [y]ou can do everything but swear that their identification is completely reliable. Despite the questionable character of the photograph used to identify [Ward], nevertheless you are permitted to make that argument; that's going to by up to [the jury]. But I'm not going to permit them to come in here and say, do you see the person you identified in court? Yeah, he's sitting right there. Well, who else would they identify? And you don't -- you know, this is not a case -- if the photo lineup were better or if there had been a live lineup, I might be less inclined to make this ruling. But I'm not going to permit what I regard as an inherently weak photo lineup which I think is barely usable, but nevertheless I think it still is usable, to be bolstered by pointing out somebody in court, I'm just not." (App. 248-49).

Despite the glaring issue of a suggestive identification procedure, which affords well-settled grounds for suppression, see *United States v. Wilkerson*, 84 F.3d 692, 695 (4th Cir.1996) and cases cited, defense counsel never sought suppression of the identifications.

2. THE PICKUP TRUCK ISSUE

As noted above, the clerk who processed the second box and identified the defendant's photograph from the lineup, also testified that the person who gave her the box drove a pickup truck. In an apparent attempt to add credibility to that clerk's identification, a law enforcement officer testified that he observed a pickup truck at the defendant's grandmother's house where the defendant resided. (App. 324). That officer testified: "In the back of that residence was a dark-colored pickup truck that was unusual to me because the rest of the vehicles were parked out front and this vehicle was parked up into the back yard." (*Id.*)

The pickup truck referred to by the officer does not belong to the defendant, has not been in driving condition for years, had no tires, and had no valid license or registration. Although these facts were known to defense counsel (and were presumably known in whole or part to the officer who had observed the truck), the only evidence presented to the jury on

the matter by defense counsel was the uncorroborated testimony of the defendant's grandmother. (App. 368-69). Defense counsel failed to present a photograph of the truck, documentary evidence concerning the truck, the owner of the truck, or any testimony from any witness who was not a direct relative of the defendant.

3. DEFENSE COUNSEL'S FAILURE TO OBJECT

During his closing argument to the jury, the prosecutor vouched for the credibility of the clerk who processed the second box as follows: "There is nothing forcing her to testify one way or the other, except for the fact, I think as a citizen she knows that she is supposed to tell the truth from the stand. You can think that; an average citizen knows they are supposed to tell the truth from the stand." (App. 385). Defense counsel did not object, but this Court did, warning the prosecutor that he was "... perilously close to vouching for a witness and blowing this whole case." (App. 385).

4. DEFENSE COUNSEL'S FAILURE TOINVESTIGATE OR PRESENT ALIBI EVIDENCE

Federal Express employee Jackie May testified that on January 26, 1996, between 1:00 p.m and 3:00 p.m., the "Dale Riche" box was brought to her. (App. 299, 308). May testified that the person who brought her the box was the person who filled out the paperwork. (App. 313). May claimed that the person was the one she identified in the photographic lineup, namely, the defendant. (App. 304).

Defense counsel was advised by the defendant, well in advance of trial, that he was working at his place of employment, Dave's Auto Sound, in Miami, Florida, on January 26, 1996 from 11:00 a.m. to 8:00 p.m. (The defendant's employment at Dave's Auto Sound from 1992-1997 was verified in his Presentence Investigation Report at page 9.) Defense counsel was given the names of the alibi witnesses who worked at Dave's Auto Sound, then located at 740 N.W. 107th Street, Miami, Florida. The alibi witnesses included Warren Graham (supervisor), David Edwards (owner), and Richard Wesley (manager). The defendant also supplied defense counsel with his time card for the week of January 22, 1996. Defense counsel was also advised by the defendant that on many prior occasions, he used the Federal Express office where Jackie May was employed, which would have explained how she knew his face.

That Jackie May's identification was a mistake could have

been established with the following which was available at the time of the defendant's trial: evidence that May knew the defendant from his previous visits to the Federal Express office unrelated to this case; evidence that the defendant was at his place of employment when May claimed he was in the Federal Express office. But defense counsel neither investigated nor presented any of this exculpatory evidence.

A defendant is entitled to an evidentiary hearing upon a showing that defense counsel failed to call crucial witnesses. *Sneed v. Smith*, 670 F.2d 1348, 1353-55 (4th Cir.1982). The defendant was made such a showing and is therefore, at the very least, entitled to an evidentiary hearing.

5. DEFENSE COUNSEL'S FAILURE WITH REGARD TO THE DEFENDANT'S RIGHT TO TESTIFY

The defendant wanted to testify that he did not know the contents of the first box. As for the second box, he sought to testify that he was not in the Federal Express office, did not execute the air bill, and had nothing to do with that box. He so informed his counsel but he was not properly advised of the nature and/or existence of the right to testify. The defendant was prejudiced thereby because there cannot be confidence in the outcome of the case and/or the result of the trial would have been different. Additionally, there was no on-the-record advisement of the right to testify or waiver thereof.

Counsel's failure on this issue denied the defendant his constitutional right to testify. See *Rock v. Arkansas*, 483 U.S. 44 (1987).

CONCLUSION

The defendant was denied his constitutional right to effective assistance of counsel. The numerous instances of these and other failures and omissions by defense counsel, whether viewed individually or cumulative, entitle the defendant to a new trial. At the very least, the defendant should be afforded an evidentiary hearing.

Respectfully submitted,

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_____
STEPHEN H. ROSEN
Counsel for Desmond Ward

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed by overnight delivery to Frank Whitney, Assistant United States Attorney, Suite 1700, Carillon Building, 227 West Trade Street, Charlotte, NC 28202, this ____ day of _____, 2000.

_____
STEPHEN H. ROSEN

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
3:000V257-1-MU
3:96CR29-MU

DESMOND WARD,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

ORDER

THIS MATTER is before this Court upon Respondent's Motion to Dismiss (Document # 4), filed July 24, 2000. For the reasons set forth below and in Respondent's Motion to Dismiss, Respondent's Motion to Dismiss is granted and Petitioner's Motion to Vacate is dismissed.

PROCEDURAL HISTORY

On September 12, 1997, after a trial by jury, Petitioner was convicted of conspiracy to possess with the intent to distribute crack cocaine and of using a communication facility to facilitate the distribution of drugs. On April 29, 1999, this Court sentenced Petitioner to 235 months imprisonment. Petitioner appealed. On April 6, 1999, the United States Court of Appeals for the Fourth Circuit affirmed Petitioner's sentence and conviction.

On June 4, 2000, Petitioner filed the instant Motion to Vacate, Set Aside, or Correct Sentence alleging that he had received ineffective assistance of counsel. The Court will address each of Petitioner's contentions below.

ANALYSIS

Petitioner's contention that he received ineffective assistance of counsel is governed by the holding in Strickland v. Washington,466 U.S. 668, 687-91 (1984). In Strickland, the Supreme Court held that in order to succeed on an ineffective assistance of counsel claim, a petitioner must establish that counsel's performance was constitutionally defective to the extent it fell below an objective standard of reasonableness, and that he was prejudiced thereby, that is, there is a reasonable probability that but for the error, the outcome would have been different. In making this determination, there is a strong

presumption that counsel's conduct was within the wide range of reasonable professional assistance. Id. at 689; Fields v. Attorney General of Md.,956 F.2d 1290, 1297-99 (4thCir.), cert. denied,474 U.S. 865 (1995). Petitioner bears the burden of proving Strickland prejudice. Fields, 956 F.2d at 1297. If the petitioner fails to meet this burden, a "reviewing court need not consider the performance prong." Id. at 1290.

1. Failure to Move to Suppress Photo Identification

Petitioner alleges that his counsel were ineffective for failing to move to suppress the photographic identification of Petitioner by the AGS Network Carrier Clerk, Jason Cardini, and the federal express clerk, Jacqueline May. Petitioner argues that his counsel should have moved to suppress these identifications on the basis that the lineups were suggestive.FN

> FN It is unclear to the Court why Petitioner's counsel would have moved to suppress the identification procedure used by the police when questioning Mr. Cardini. Petitioner never contended that he did not mail the first package.

The Due Process Clause protects a suspect or defendant against pretrial identification procedures which are impermissibly suggestive. Manson v. Brathwaite, 432 U.S. 98, 113 (1977).

To determine whether a pre-trial identification procedure violates the Due Process clause, a court must undertake a two-step analysis. See Neil v. Biggers,409 U.S. 188, 196-201 (1972). First, a court must examine whether the initial identification procedure was impermissibly suggestive. Second, even if the procedure was impermissibly suggestive, the court must determine whether the pre-trial identification was reliable. Id. at 199-200. To assess an identification procedure's reliability, courts typically analyze five factors: 1) the witness' opportunity to view the perpetrator at the time of the crime; 2) the witness' degree of attention at the time of the crime; 3) the accuracy of the witness' prior description of the perpetrator; 4) the witness' level of certainty when identifying the defendant as the perpetrator at the time of the confrontation; and 5) the length of time between the crime and the confrontation. Id.

In the instant case, even if the identification process were suggestive, an application of the five factors identified above leads this Court to conclude that the identification of Petitioner

by Ms. May was sufficiently reliable that any motion to suppress made by the Petitioner's trial counsel would have been denied.

Ms. May had a clear opportunity to observe the Petitioner. She waited on him for a minimum of several minutes on at least three occasions . (Tr. Trans. at pp. 291-93). Moreover, although he was a customer, and in no way associated with any crime at the time of their initial encounter, the exchange was unusual, (Tr. Trans. at p. 292), and did not occur on a busy day or during a busy shift. (Tr. Trans. at pp. 291-92, 295, 306). Ms. May's degree of attention would also have been high. Given the uncertainty of the customer as to how he wished to send the package and his going and coming back at least twice, it is likely that he had Ms. May's full attention. Ms. May also provided a physical description which, although it was not overly detailed, was accurate. (fr. Trans. at pp. 308-09). Ms. May's level of certainty was extremely high. At trial she testified that she had no trouble identifying Petitioner in the line up and that she had been "certain" Petitioner was the individual who mailed the package in question. (Tr. Trans. at p. 294). Indeed, she testified that she had been able to identify him "right away, instantly." (Tr. Trans. at p. 305). Finally, only four days elapsed between Ms. May' s encounter with Petitioner and her identification of Petitioner from the photo lineup. (Tr. Trans. at pp. 293-94). Based upon the above, the Court cannot conclude that there was a substantial likelihood of irreparable misidentification.

Because this Court would have denied any motion to suppress made by Petitioner's counsel, their failure to make one

> FN2 The Court sua sponte ruled that the witnesses would not be allowed to make an in-court identification of Petitioner. The Court clearly could have made sua sponte motion to suppress the pre-trial identifications and chose not to take such an action because the Court believed the identification process to be constitutional. (Tr. Trans. at pp. 237-38)

could not have prejudiced Petitioner and his ineffective assistance of counsel claim on this basis must fail.

2. Failure to Investigate

Petitioner also alleges that his counsel were ineffective for failing to present evidence to the jury that the pick-up truck

referred to by a witness at Petitioner's trial could not have been histruck. Petitioner asserts that his counsel should have presented a photograph of the truck, documentary evidence concerning the truck, the owner of the truck, or testimony from a witness who was not a direct relative of Petitioner.

After a thorough review of the trial transcript, this Court disagrees with Petitioner'scontention. For obvious reasons, the government did not rely upon the existence of a dark colored pick-up in the yard of Petitioner's residence to bolster its case against Petitioner. In fact, the testimony from the federal express employee concerning her statement that the individual who mailed the package in question drove a dark-colored pick-up was elicited by defense counsel, not the prosecution. (Tr. Trans. at pp. 307-08). After eliciting this information from the Federal Express employee, defense counsel later proceeded to vigorously cross-examine Detective Halloran and elicited from the officer that he had never examined the vehicle to see if it was in operable condition; he had never photographed the truck to show it to the Federal Express employee; and had never checked to see if the truck had valid tags. (Tr. Trans. at pp. 315-17). In addition, Petitioner's counsel called Petitioner's grandmother to testify to the fact that Petitioner did not own the pick-up truck and to the fact that the truck was inoperable and had been for years. (Tr. Trans. at pp. 357-59).

The prosecution did not present any evidence that the truck in the yard at Petitioner's residence was his or was even operable. Therefore there was no need for counsel to have the owner of the truck testify or to present a photograph of the truck. Consequently, this Court concludes that counsel were not ineffective with regard to their strategic decisions concerning the pick-up truck and its owner and the condition of the truck.

3. Failure to Object Closing Argument

Petitioner also alleges that his counsel were ineffective for failing to object to the prosecutor's improper vouching during closing argument. More specifically, Petitioner alleges that his counsel should have objected to the prosecutor's statement with regard to the testimony of one of the Federal Express employees that: "There is nothing forcing her to testify one way or the other, except for the fact, I think as a citizen she knows that she is supposed to tell the truth from the stand. You can think that; an average citizen knows they are supposed to tell the truth from the stand." (Tr. Trans. at p. 373).

It is impermissible for a prosecutor to vouch for or bolster

the testimony of a government witness during arguments to the jury. See United States v. Sanchez,118 F.3d 192, 198 (4thCir. 1997). Vouching occurs when the prosecutor's remarks are such that a jury could reasonably believe that the prosecutor was indicating a personal belief in the credibility of the witness. See United States v. Lewis,10 F.3d 1086, 1089 (4thCir. 1993).

Based upon an examination of the statement at issue and the entire closing argument of the prosecution, the Court does not find that the prosecutor impermissibly vouched for the federal express employee. The prosecutor's remarks attempted to remind the jury of the status of the witness rather than convey any specific knowledge as to the personal credibility of the witness. Consequently, Petitioner's counsel were not ineffective for failing to object to the prosecution's statement concerning the federal express employee.

4. Failure to Investigate/Present Alibi

Petitioner also alleges that his counsel were ineffective for failing to present alibi evidence. More specifically Petitioner argues that his counsel should have presented evidence to establish that he was at his place of employment during the time period in which Jackie May testified that she saw Petitioner at the Federal Express store. Petitioner attaches a time card to his Motion to Vacate to support his contention.

It appears clear from the record that Petitioner and his counsel must have discussed this alleged alibi defense. The manager and supervisor at Petitioner's place of employment were on Petitioner's counsel's witness list and his timecard was listed as a potential exhibit.

In his Motion to Vacate Petitioner asserts that his counsel should have called an owner, a supervisor, and a manager of his place of employment. Significantly, however, he does not provide the Court with any *affidavits* or other evidence to indicate to what these individuals might be willing to testify. Such information is not forthcoming even after Respondent points out this failing. Moreover, the Petitioner's timecard is not very persuasive evidence. The timecard does not have any official company markings on it. Nor does it indicate when Petitioner took his lunch time. Nor does it have any indication on it that it was verified by anyone at the company. Consequently, Petitioner has failed to carry his burden of proof as to the prejudice prong of his claim and his ineffective assistance of counsel claim on this basis fails.

5. Failure to Advise

Finally, Petitioner alleges that his counsel were ineffective for failing to properly advise him as to his right to testify. Petitioner alleges that he wanted to testify that he did not know the contents of the first box. He also wanted to testify that he had nothing to do with the second federal express box.

Petitioner does not provide specifics as to how counsel did not properly advise him of his right to testify. Petitioner admits that he and counsel discussed this topic. Clearly Petitioner knew of his tight to testify.

Moreover, the information that Petitioner alleges that he wished to testify to on the stand was clearly conveyed throughout the trial. That is, Petitioner has not asserted that he would have testified to information that only Petitioner could have provided to the jury. Based upon the above, the Court finds that Petitioner has not established that his counsel were ineffective or that he was prejudiced.

Respondent emphasizes that Petitioner would have been extremely vulnerable on cross-examination. Prior to trial this Court ruled that the fact that Petitioner possessed cocaine and a gun when he was arrested was inadmissible due to its overly prejudicial nature. Such information therefore could not be presented in the Government's case-in-chief. Nor could it have been automatically elicited on cross-examination. However, if Petitioner testified, he ran the risk that he might open the door to such a line of very damaging questioning.

THEREFORE, IT IS HEREBY ORDERED that: Respondents Motion to Dismiss is GRANTED and Petitioner's Motion to Vacate is DISMISSED.

INFORMAL BRIEF

RE: United States v. Desmond Ward
4th Circuit Record Number 03-7745
CR-96-29
CA-00-257-3-1-MU

1. **Jurisdiction (for appellants only)**

A. What is the name of the court from which you are appealing?

United States District Court for the Western District of North Carolina, Charlotte Division

B. What is the date of the order you are appealing?

September 12, 2003

2. **Timeliness of appeal (for prisoners only)**

N/A

3. **Issues on Appeal**

Issue 1. Whether the district court applied the wrong standard in summarily rejecting the defendant's claim that he was afforded ineffective assistance of counsel because his trial counsel failed to move to suppress a suggestive identification procedure.

Supporting Facts and Argument.

A. Summary of Background Facts for All Issues

The defendant's two convictions and sentence of imprisonment for 235 months arose from two packages containing cocaine that were shipped through Federal Express. The defendant never disputed that he gave the first package to a courier. But the defendant has always contended that he did not know the contents of the first package.

As for the second package, the defendant contends, as he always has, that he is not guilty because he had nothing at all to do with that shipment.

B. Defense Counsel's Failure to Challenge the Suggestive Identification

The district judge assumed that the photographic identification procedure employed with Jacqueline May, the clerk who processed the second package, was suggestive. The district judge nevertheless summarily denied relief even though trial counsel neither filed a motion to suppress the identification nor investigated the issue. The district judge concluded that had trial counsel filed a motion to suppress, the motion would have been denied. Therefore, the district judge concluded, the claim of ineffective assistance of counsel on this ground fails.

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) established the now familiar two-pronged test for determining whether a defendant has received ineffective assistance of counsel in violation of the Sixth Amendment to the Constitution of the United States. Under the first prong, the court must determine whether counsel's performance fell below the acceptable range of professionally competent assistance so as to threaten the adversarial testing process. *Id.* at 690, 104 S.Ct. at 2066.

Assuming, as the district judge did, that the identification procedure was unduly suggestive, then the first prong of *Strickland* was satisfied for the obvious reason that defense counsel performed deficiently by failing to file a motion to suppress an improperly suggestive identification procedure.

Under the second prong of the test, the court must determine whether the deficient performance of counsel prejudiced the defendant's case. To satisfy the prejudice prong of the test, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. at 2068-69. "The result of a proceeding can be rendered unreliable, and hence the proceeding can be rendered unreliable, even if the

errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Id.* at 694, 104 S.Ct. at 2068.

The district judge found no prejudice on the ground that had defense counsel moved to suppress the identification procedure, the district judge would have denied the motion. That is not the proper standard. In fact, in *Strickland*, the Supreme Court expressly disapproved such an outcome-determinative standard. *Id.* at 694, 104 S.Ct. at 2068 ("... a defendant need not show that counsel's deficient conduct more likely than not altered the outcome of the case. *** The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.")

The proper standard in this case for determining prejudice under *Strickland* is whether the failure to investigate and make the motion to suppress rendered the proceeding itself unfair, even if such failure "cannot be shown by a preponderance of the evidence to determine the outcome." *Id.* This issue is worthy of review on the merits.

Additionally, because defense counsel never filed a motion to suppress or investigated the matter, there was no hearing conducted on the issue of suggestiveness of the identification. Thus, the district judge's conclusion that he would have denied a motion to suppress was based solely upon evidence adduced at the defendant's trial where the issue of guilt or innocence, not suggestiveness of the identification procedure, was litigated. Because key witnesses and questions were never presented on the issue of identification, the district judge's conclusion that he would have denied a motion to suppress is based upon an unacceptable degree of speculation. Had there been an evidentiary hearing on a motion to suppress, evidence not presented at the trial could have shown unreliability of the identification procedure. In fact, even the trial evidence offered strong hints at the unreliability of the identification by the witness in question, May. For example, May testified at trial that the defendant arrived in a pick-up truck. To corroborate this testimony, the government introduced a photograph of a pick-up truck taken where the defendant resided. But the pickup truck photographed was inoperable, and had been inoperable for

a considerable period of time, including the day that May claimed to have seen the defendant. The truck was owned by Charles Wilford. Defense counsel never investigated Wilford or the truck's inoperability, despite the defendant's requests. Such evidence would have been highly relevant at a hearing on a motion to suppress.

Had an evidentiary hearing been held upon a proper motion to suppress, these and other facts supportive of the motion would have been developed. But without the hearing, the process afforded the defendant was unreliable.

Issue 2.

Whether the district judge should have held an evidentiary hearing upon the claim of ineffective assistance of counsel for failure to file a motion to suppress the suggestive identification procedure.

Supporting Facts and Argument.

The Supporting Facts and Argument of Issue 1 are adopted herein.

The district judge erred in denying the identification/ineffectiveness issue summarily. The issue of defense counsel's ineffectiveness for not filing the motion is fact-based and cannot be decided fairly without an evidentiary hearing. At such a hearing, all of the facts surrounding trial counsel's lack of investigation and failure to make the motion would be heard. See *Sneed v. Smith,* 670 F.2d 1348 (4th Cir.1982).

Issue 3.

Whether the district judge erred in summarily denying the defendant's claim that his trial counsel was ineffective for failure to investigate and present evidence about the pickup truck.

Supporting Facts and Argument.

The district judge concluded that the defendant's trial counsel was not ineffective with regard to "strategic decisions concerning the pickup truck and its owner and condition of the truck." See attached order of district judge at 5 ("Order").

Whether defense counsel failed to present the exculpatory evidence concerning the pickup truck based upon strategy is a fact-based issue that cannot be resolved summarily. The defendant is entitled to an evidentiary hearing on this issue. See *Sneed, supra.*

The pickup truck evidence was critical. May testified that the person who gave her the box drove a pickup truck. In order to bolster May's identification, a law enforcement officer testified that he observed a pickup truck at the defendant's grandmother's house where the defendant resided. (T. 313). That officer testified: "In the back of that residence was a dark-colored pickup truck that was unusual to me because the rest of the vehicles were parked out front and this vehicle was parked up into the back yard." (*Id.*).

However, the pickup truck referred to by the officer does not belong to the defendant, has not been in driving condition for years, had no tires, and had no valid license or registration. Although these facts were known to defense counsel (and were presumably known in whole or part to the officer who had observed the truck), the only evidence presented to the jury on the matter by defense counsel was the uncorroborated testimony of the defendant's grandmother. (T. 356-57). Defense counsel failed to present a photograph of the truck, documentary evidence concerning the truck, the owner of the truck, or any testimony from any witness who was not a direct relative of the defendant. Defense counsel's inadequate investigation constituted ineffective assistance of counsel and prejudiced the defendant. See *Wiggins v. Smith*, ___ U.S. ___, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003).

Issue 4.

Whether the district court should have held an evidentiary hearing to determine the claim of ineffective assistance of

counsel for failure to investigate and present the alibi evidence.

Supporting Facts and Argument.

Defense counsel failed to investigate and present the alibi evidence with regard to the second package. The defendant, in his sworn motion to vacate, specifically alleged that: he was at work at Dave's Auto Sound from 11:00 a.m. to 8:00 p.m on January 26, 1996; he provided his counsel with the names of his alibi witnesses who were at work with him; and he supplied counsel with his time card for that week at work. The defendant is obviously prepared to prove all of these sworn allegations at an evidentiary hearing and so moves for evidentiary hearing.

The district judge ruled that the defendant and his counsel "must have discussed this alleged alibi defense" and that the timecard provided to the court in support of the motion was "not very persuasive evidence." Order at 6-7. Whether the defendant and his counsel discussed the defense and what they discussed poses factual issues which can only be resolved via an evidentiary hearing. See *United States v. Conley*, 829 F.2d 37 (4th Cir.1987) (unpublished). See also *Sanderson v. Rice*, 777 F.2d 902 (4th Cir.1985); *Sneed, supra*. Whether the alibi evidence is persuasive is a question for a jury.

Issue 5.

Whether defense counsel ineffectively denied the defendant his right to testify at trial.

Supporting Facts and Argument.

The defendant swore to the following allegations in his motion to vacate: he wanted to testify at his trial that he did not know the contents of the first box; as for the second box, he sought to testify that he was not in the Federal Express office, did not execute the air bill, and had nothing to do with that box; the defendant so informed his counsel but he was not properly advised of the nature and/or existence of the right to testify.

The defendant was prejudiced thereby because there cannot be confidence in the outcome of the case and/or the result of the trial would have been different. Additionally, there was no on-

the-record advisement of the right to testify or waiver thereof.

Counsel's failure on this issue denied the defendant his constitutional right to testify. See *Rock v. Arkansas*, 483 U.S. 44 (1987).

The district judge denied the claim without an evidentiary hearing. The judge ruled that because the defendant and his counsel discussed testifying, the defendant knew of this right to testify. *Knowledge* of the right is not at issue. *Denial* of the right is the issue.

The district judge also ruled that the information the defendant would have conveyed to the jury was conveyed at the trial anyway. That does not cure a denial of the right to testify. Moreover, the jury could give great weight to the evidence when heard from the mouth of the accused.

The district judge also ruled that if the defendant testified, he faced the risk of impeachment. Whether such a strategic consideration entered into the issue cannot be resolved without an evidentiary hearing.

4. Relief Requested.

The defendant requests that this appeal be heard on the merits and that the cause be reversed and remanded for a new trial or an evidentiary hearing on all of the issues.

5. **Prior Appeals**

A. Have you filed other appeals in this court? YES.

B. What are the case names and docket numbers?

United States v. Ward, No. 98-4365 (4th Cir. April 6, 1999).

Respectfully submitted,

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90 Fed.Appx. 35
(Cite as: 90 Fed.Appx. 35, 2004 WL 542256 (4th Cir.(N.C.)))
This case was not selected for publication in the Federal Reporter.

UNPUBLISHED

United States Court of Appeals,
Fourth Circuit.

UNITED STATES of America, Plaintiff--Appellee,
v.
Desmond WARD, a/k/a David A. King, Defendant--Appellant.

No. 03-7745.

Submitted March 11, 2004.
Decided March 18, 2004.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. Graham C. Mullen, Chief District Judge. (CR-96-29; CA-00-257-3-1-MU).

Stephen Howard Rosen, Miami, Florida, for Appellant.

Frank DeArmon Whitney, United States Attorney, Raleigh, North Carolina, for Appellee.

Before WIDENER, WILKINSON, and MICHAEL, Circuit Judges.

Dismissed by unpublished PER CURIAM opinion.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM.

Desmond Ward seeks to appeal the district court's order denying relief on his motion filed under 28 U.S.C. § 2255 (2000). The order is not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1) (2000). A certificate of appealability will not issue

absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2000). A prisoner satisfies this standard by demonstrating that reasonable jurists would find that his constitutional claims are debatable and that any dispositive procedural rulings by the district court are also debatable or wrong. *See Miller-El v. Cockrell,* 537 U.S. 322, 336-38, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003); *Slack v. McDaniel,* 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000); *Rose v. Lee,* 252 F.3d 676, 683 (4th Cir.2001). We have independently reviewed the record and conclude that Ward has not made the requisite showing. Accordingly, we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

DISMISSED

90 Fed.Appx. 35, 2004 WL 542256 (4th Cir.(N.C.))

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